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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 722

V. J. ADAMS, TRUSTEE FOR GENERAL BOX COMPANY, INC., BANKRUPT,

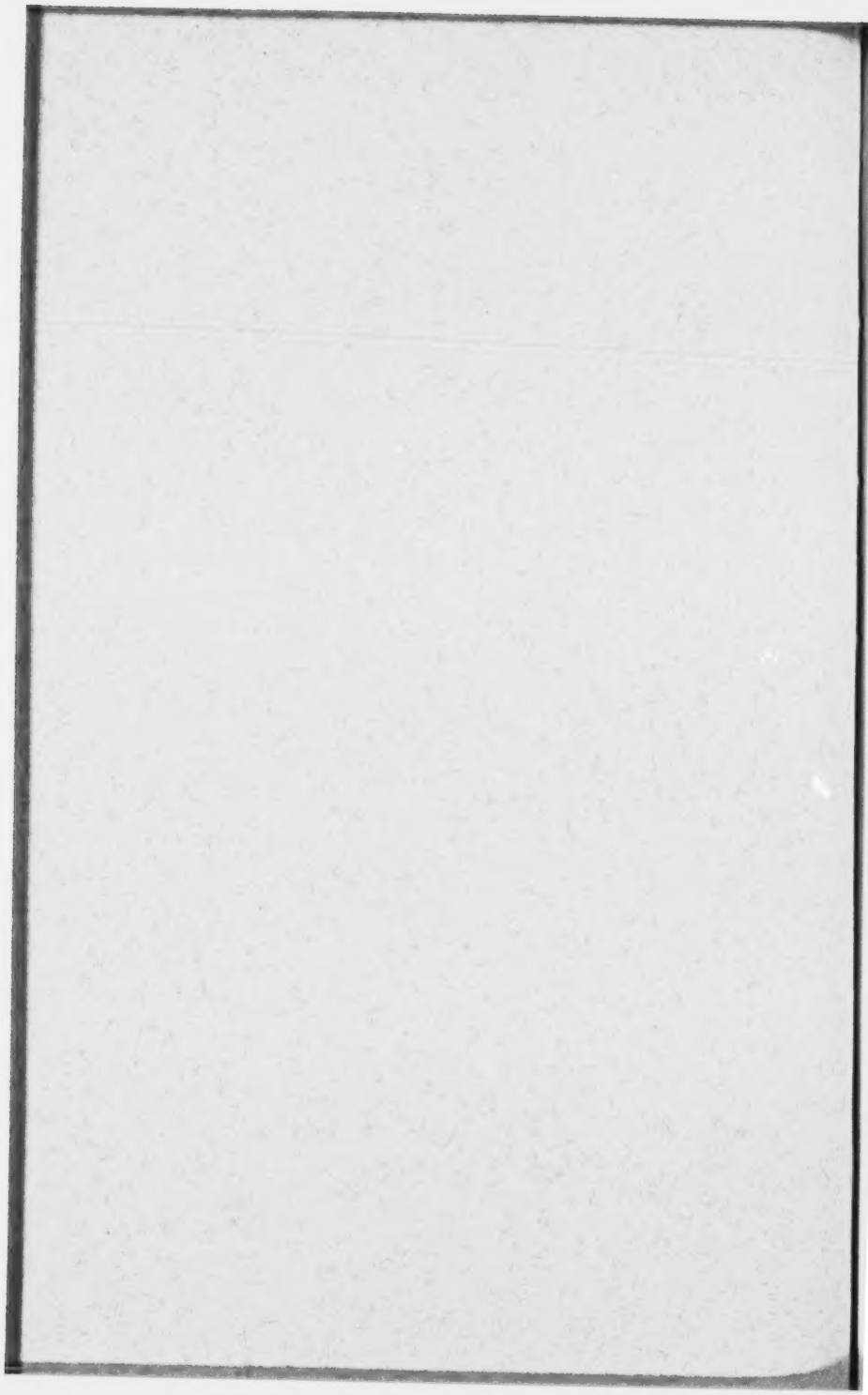
Petitioner,

vs.

CITY BANK AND TRUST COMPANY OF MACON, GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. BALDWIN MARTIN,
Counsel for Petitioner.



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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of V. J. Adams, Trustee for General Box Company, Inc., Bankrupt, respectfully shows to this honorable Court:

I. A Statement of the Matter Involved.

On December 30, 1939, the General Box Company, Inc. of Macon, Georgia, was adjudicated a bankrupt upon its voluntary petition.

Previously it had borrowed from the City Bank and Trust Company of Macon, Georgia, $1,900.00, and simultaneously therewith executed bills of sale to secure debts covering

portions of its property. Nevertheless, the bills of sale were not recorded until December 19, 1939, at a time when the company was insolvent and the bank had reasonable cause to believe it was insolvent. During the interval between the execution and recordation the bankrupt incurred debts and purchased on credit additional goods which augmented the stock mortgaged to the bank.

The trustee, contending that the bills of sale should be deemed to have been made as of the date of recording since they were not perfected as against a *bona fide* purchaser until then, sought to avoid them under section 60 (a) and (b) of the Bankruptcy Act of 1938. (Title 11, U. S. C. A. Sec. 96 (a) and (b).)

The referee sustained the trustee, but he was reversed by the district judge. The Circuit Court of Appeals affirmed the district judge, holding in effect that the language of section 60, that for the purposes of sub-sections (a) and (b) a transfer shall be deemed to have been made at the time when it became so far perfected as to prevail over bona fide purchasers and creditors, counted for naught in determining the question of antecedency of the debt for which the transfer was given.

The decision of the Circuit Court of Appeals was on November 15, 1940.

II. Statement Disclosing Court's Jurisdiction.

The statute of the United States involved is as follows:

> "a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under Chapter X, XI, XII, or XIII of this Act, the

effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapters X, XI, XII, or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

"b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent * * *."

Sec. 60 (a) and (b) of the Bankruptcy Act of 1938, Title 11, U. S. C. A. Sec. 96 (a) and (b).

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals under Title 11, U. S. C. A., Sec. 48 (c), and Title 28, U. S. C. A. Sec. 347.

III. Question Presented.

Whether, in order to be avoided as a preference, a transfer must have been made for or on account of a debt antecedent to the time when the transfer was actually made by the debtor or whether it is sufficient if the debt was antecedent to the time when the transfer must be deemed to have been made, that is, when the transfer became so far perfected that ~~on~~ no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property transferred superior to the rights of the transferee.

IV. Reasons Relied On for the Allowance of the Writ.

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

The Court of Appeals has frittered away the most vital provision of Section 60—the most sorely needed and the most prized reform of the entire Act of 1938.

The abolition of secret liens was one of the paramount attainments of the Chandler Act. The radical, elaborate and precise rewording of section 60 was in response to the long and insistent demand of credit associations and others concerned in the administration of the bankruptcy law for the elimination of secret liens; but verily under the decision of the Circuit Court of Appeals secret liens, instead of being abolished, are better protected than ever before.

The importance of the question involved is indicated by the intention of the Congress in the enactment of the Chandler Act.

> "The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it became so far perfected that neither a bona fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted, it includes a failure to record and any other ground which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee * * *."
>
> (Report No. 1409 HR 8046 July 29, 1937, 75th Congress, 1st Session.)

The volume of credit transactions daily increases. A decision of this question is vital to merchants, bankers and to all who are engaged in mercantile transactions, indeed even to the lowliest of employees, for that the rights of all

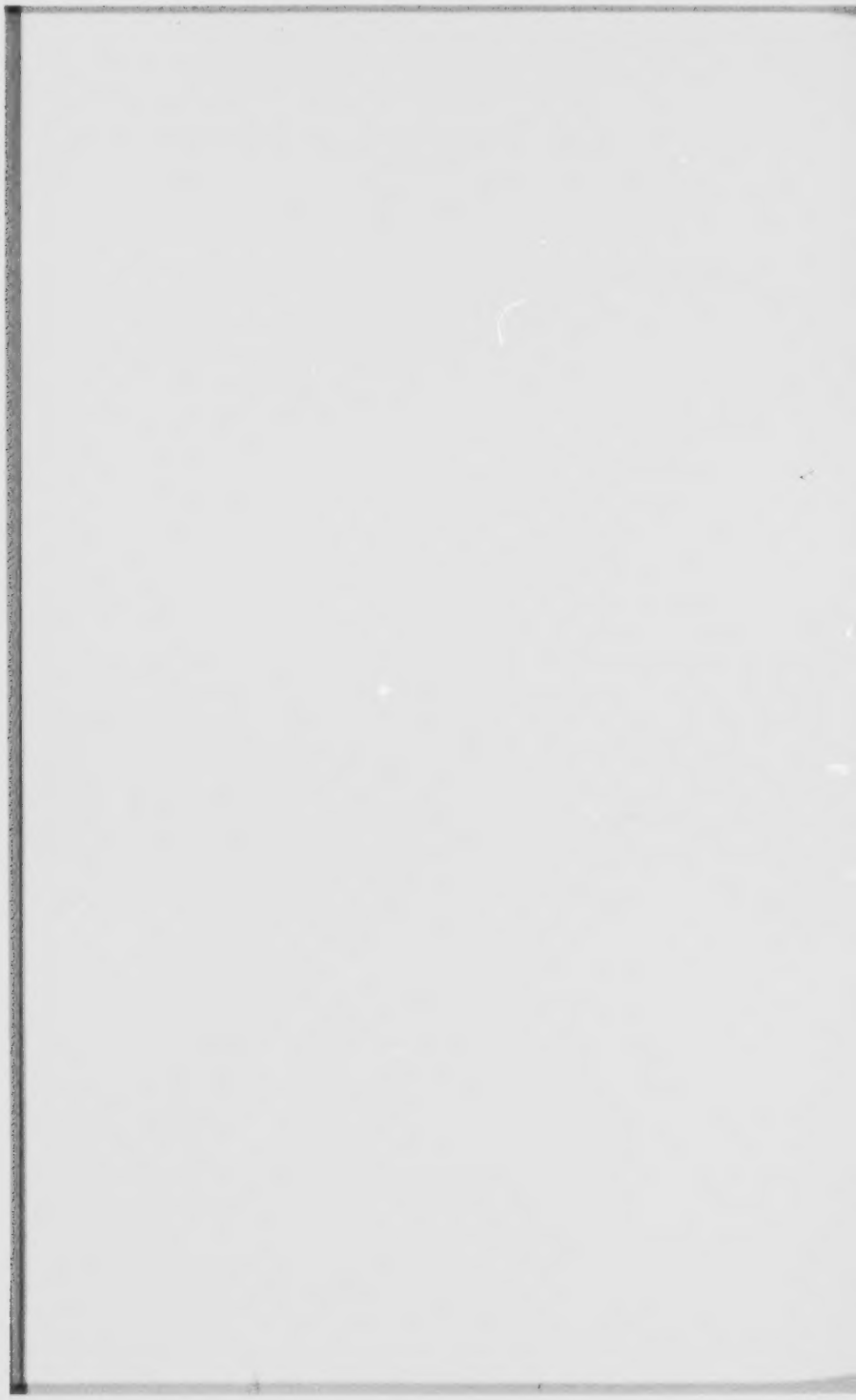
will be subordinated to the unrecorded and unperfected secret lien under the decision of the Court of Appeals.

Furthermore an orderly and uniform administration of the bankruptcy law calls for a settlement of this question by this Court.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the courts below, and will present its brief for consideration with this petition, discussing at greater length the question involved.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued as of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court, entitled V. J. Adams, Trustee for General Box Company, Inc., Bankrupt *v.* City Bank and Trust Company, and numbered 9655 in said court, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this honorable Court, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just.

V. J. ADAMS,
Trustee for General Box Company, Inc., Bankrupt,
By T. BALDWIN MARTIN,
Attorney for Petitioner.



SUPREME COURT OF THE UNITED STATES

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No. 722

V. J. ADAMS, Trustee for General Box Company, Inc., Bankrupt,

Petitioner,

vs.

CITY BANK AND TRUST COMPANY OF MACON, GEORGIA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Below in parallel columns are the new act and the old act with the words immaterial to the question omitted;

Section 60.

Chandler Act	Old Act
"a. A preference is a transfer * * * of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition	"a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * *, made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one

in bankruptcy * * *, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. * * *

"b. Any such preference may be avoided by the trustee if the creditor receiving it * * * has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent * * * ."

of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording * * * of the transfer, if by law such recording * * * is required or permitted.

"b. If a bankrupt shall have * * * made a transfer of any of his property, and if at the time of the transfer * * * or of the recording * * * of the transfer if by law recording * * * thereof is required, and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee * * * ."

Every transfer of every character made by a debtor prior to bankruptcy must face the test of section 60; and no transfer may escape condemnation as a preference merely by applying the first sentence of section 60 (a) to the transaction.

The trustee does not at all contend that a preference is other than a transfer for an antecedent debt, but the unanswered and unanswerable contention of the trustee is that the date of perfection as against a bona fide purchaser or creditor is the controlling date in determining whether the transfer was given on account of a present or an antecedent debt. The trustee does contend that it is enough in this case that the debt existed when the transfer was perfected as against purchasers and creditors by recordation. The words "shall be deemed to have been made" are as meaningful in determining whether the transfer was given on account of an antecedent debt as they are in determining whether the transfer was given while the debtor was insolvent or within the four months prior to bankruptcy.

Treating the date of recordation as the effective date of the transfer instead of its actual date is no revolutionary conception.

Many courts, as will hereinafter be shown, many years ago thought that Congress intended under the old act to strike down every secret transfer.

It is true that in the Act of 1898, section 60 made no reference to the recording or registering of the transfer.

However, in 1903 Congress amended section 60 by adding to sub-section (a) the provision: "Such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."

As early as 1905, we find Judge Archbald, a learned judge of the District Court of Pennsylvania, saying that the date of recording had by the amendment of 1903 become the controlling date.

> "Held, That the right of the trustee to set aside the conveyance was to be determined by reference to section 60a of the bankruptcy act * * * as amended by Act February 5, 1903. * * * according to the

proper construction of which a deed by which a transfer of a bankrupt's property is effected, under which no possession is taken, *is to be judged on the question of preference by the date when it is put on record,* regardless of the date of delivery. * * *'' (Emphasis ours.)

English v. *Ross,* 140 Fed. 630 (2-d).

In 1908 the district judge of Idaho used the same identical words which are now incorporated in the Act.

"The mortgage 'transfer' must therefore be deemed to have been made on the 11th day of February, 1907 (the date of record)."

In re Hickerson, 162 Fed. 345, p. 347.

"* * * the effect of a transfer by the bankrupts as constituting a preference must be judged as of the date it was filed for record * * *."

McElvain v. *Hardesty,* (8 C. C. A.) 169 Fed. 31 (2).

Other district and circuit courts reached a different conclusion laying emphasis on the fact that section 60 (b), the enforcing section, had not been amended to conform with section 60 (a). See *Debus* v. *Yates,* 193 Fed. 427, p. 452.

Thereafter in 1910, Congress again amended section 60 by inserting in section 60 (b) the words "or of the recording or registering of the transfer if by law recording or registering thereof is required and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference."

The courts still differed as to the intention of Congress and this Court granted a certiorari to settle the question. In the case of *Cary* v. *Donahoo,* 240 U. S. 430, 60 L. Ed. 726, this Court said:

"With respect to the construction of the clause in question, (Section 60) there has been diversity of opin-

> ion in the circuit courts of appeals. In the sixth, seventh and eighth circuits the view has been taken that the word 'required' refers 'to the character of the instrument giving the preference' without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. * * * A different conclusion has been reached in the second, fifth and ninth circuits."

Justice Hughes then discussed the history of section 60 and he thought it to be of the greatest significance that the Senate had stricken from the amendment of 1903 as passed by the House of Representatives the words "or permitted" in the treating of recording and registering. He concluded:

> "As Congress did not undertake in section 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred."

As a result of this decision secret transfers flourished as never before in those States where recording was not required to validate a transfer.

Hence in 1926 Congress once more amended section 60 by adding the words "or permitted", whose omission had appeared so controlling to this Court. But alas, the words were only added to section 60 (a) and section 60 (b) was untouched.

Again diversity arose, some courts saying that since Congress had not amended section 60 (b), which was the enforcing section, the addition of the words "or permitted" to section 60 (a) did not render an unrecorded transfer a preference (*First National Bank* v. *Live Stock National Bank,* 8 C. C. A., 31 F. (2d) 416); others holding that the

amendment of Congress was meaningless if not given effect to strike down all secret transfers (*Foltz* v. *Davis,* 7 C. C. A., 68 F. (2d) 495). This Court had not settled this diversity at the time of the enactment of the Chandler Act.

The intention of Congress in passing the Chandler Act is beyond cavil. With respect to section 60 the House Committee said:

> "The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it became so far perfected that neither a bona fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected."
>
> (Report No. 1409, H. R. 8046, July 29, 1937, 75th Congress, 1st Session.)

> "* * * The validity of the transfer is to be tested as of the date of the recording, not of the transfer. Secret liens first made public during insolvency and with notice thereof are to be vulnerable for a period of four months. * * * Indeed, the Supreme Court has gone further and, altogether unnecessarily it would seem, recognized fictions of relation back under state law whereby a tardy perfection of a transfer validates it as of an earlier date such as the date of the execution of the instrument of transfer. All decisions to such effect are intended to encounter as flat a contradiction in the Chandler Bill as statutory English permits."
>
> McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act (1937), 4 U. of Chi. L. Rev. 369, 394 (392).

The debt must exist when the transfer was made, but by section 60 (a) the transfer was made when it was perfected against purchasers and creditors, that is, when it was recorded.

This Court will take judicial notice of the fact that the Chandler Act was the result of long and arduous study, not only by the Judiciary Committee of Congress, but by the Department of Justice. Every word was intended to count in the construction of the act.

It is plain beyond argument that Congress intended to make an end of secret transfers. It has not attempted to destroy the historic import of the preference, but it has made the date of recording the date of reckoning in determining whether the debt secured is present or past.

The Circuit Court of Appeals, by its emasculation of section 60, has cheated Congress of its unmistakable purpose.

Respectfully submitted.

T. Baldwin Martin,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM 1940

No. 722

V. J. ADAMS, TRUSTEE FOR GENERAL BOX COMPANY, INC.,

Petitioner

vs.

CITY BANK & TRUST COMPANY OF MACON, GEORGIA,

Respondent

BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. O. B. SPARKS,
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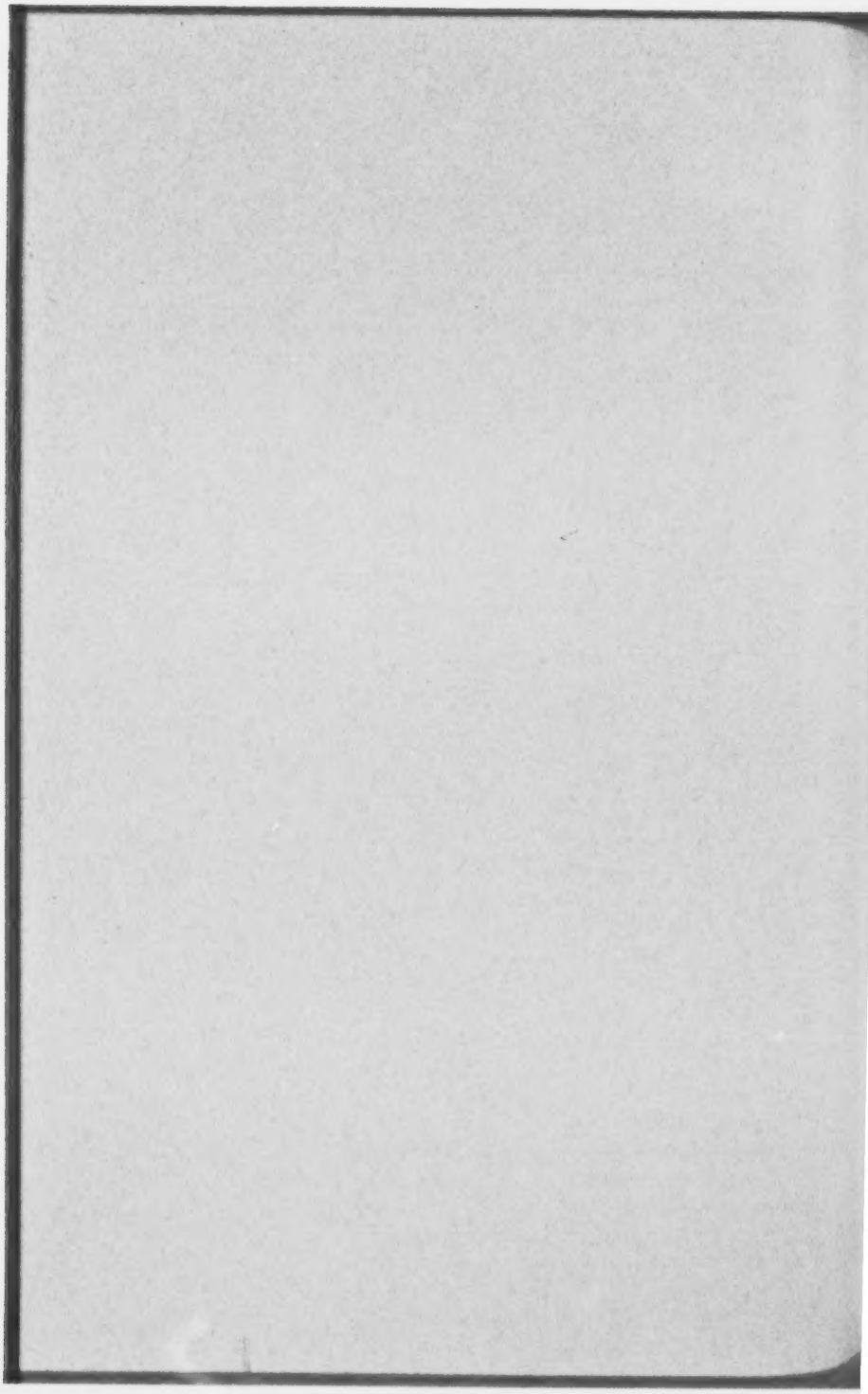
Of Counsel for Respondent.



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vs.

CITY BANK & TRUST COMPANY OF MACON, GEORGIA,

Respondent

BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

I. STATEMENT RELATIVE TO COURT'S JURISDICTION

Respondent does not contest the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals.

II. STATEMENT OF THE CASE

Respondent questions petitioner's statement of the matter involved only in respect to the following statement which appears on page 2 of the petition for writ of certiorari: "During the interval between the execution and recordation the bankrupt incurred debts and purchased on credit additional goods which augmented the stock mortgaged to the bank." We submit that this statement has no relevancy to the question at hand and is not justified by the record. One of the bills of

sale taken by respondent from the bankrupt covered a stock of goods changing in specifics. Under the Georgia law, such an instrument loses its lien "on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place."

Georgia Code 1933, §67-103.

Powers v. Georgia Florida Grocery Co., 7 *Ga. A.* 592, 67 *S.E.* 685.

Merchants & Mechanics Bank v. Beard, 162 *Ga.* 446, 134 *S.E.* 107.

There is nothing in the record to indicate that this stock was "augmented" by purchases between the date of its execution and the date of its record. The statement does appear in the record (page 4) that "the bankrupt had purchased substantial amounts of the materials referred to in items (b) to (f) of finding No. 10 since September 15, 1939, and it does not appear how much, if any, of such material sold by the trustee was on hand on September 15, 1939." But it nowhere appears what amounts of these materials were sold by the bankrupt between September 15, 1939, and December 19, 1939, so that it can not be said from the record that there was any augmentation.

The case was not submitted to the Circuit Court of Appeals or to the District Court or to the Referee on the theory that there was an augmentation of the bankrupt's stock between the date of the execution of the bills of sale and the date of their record, but the case was submitted on the contrary assumption, the question of augmentation not having been argued.

III. THE QUESTION PRESENTED

The question which was presented and which is here involved may be briefly stated in the language of the Circuit Court of Appeals as follows: "Does a bill of sale conveying personal property to secure an indebtedness simultaneously created become a preference voidable in bankruptcy, when subsequently recorded while the debtor is insolvent and within four months before the filing of the petition in bankruptcy, the creditor having reason to believe, at the date of filing for record, that the debtor is insolvent?"

IV. THE OPINION BELOW

The opinion below is reported:

Adams, Trustee, v. City Bank & Trust Company, 115 *F.* (2*d*) 453.

V. BRIEF OF ARGUMENT

As we read the petition for certiorari and the brief in support thereof, petitioner's reasons relied on for the allowance of the writ are:

(a) An important question of Federal law has been decided by the Circuit Court of Appeals, which has not been, but should be decided by this Court, and

(b) An orderly and uniform administration of the bankruptcy law calls for a settlement of this question by this Court; because

(c) Petitioner contends that the decision below manifestly misconstrues the Congressional intent expressed in Section 60 of the Chandler Act.

The first two of these reasons are really one and

the third reason is one which can not with propriety be extensively discussed in this brief. Since the petitioner has devoted a considerable portion of his discussion to the argument that the decision of the Court below is erroneous, it does seem necessary that we at least present briefly, but as clearly as possible, the basic reasons why we think the decision of the Court below should not be disturbed. It is, of course, true that whether the question "should be decided by this court," depends to some extent upon whether there was manifest error in the decision of the Circuit Court of Appeals.

It seems that a rather short time has elapsed since the enactment of the Chandler Act for anyone to say dogmatically whether or not the question here presented is of sufficient importance to necessitate a decision by this court. Our experience in bankruptcy practice leads us to believe that the question is not one which is likely to recur frequently and certainly not to involve substantial amounts of money. Those instruments which are given to secure substantial amounts of money are according to commercial usage recorded promptly after their execution as the creditor is not willing to run the risk that other liens might intervene.

But if we assume that the question is of great importance it still does not follow that a decision by this court is necessary. Those cases in which the question here involved has been raised have been decided without conflict and a denial of the writ of certiorari in the instant case would seem to be the proper course unless and until there has been some conflict among the decided cases.

Since the enactment of the Chandler Act there have been three reported decisions, among them the instant

case, construing Section 60 of the Chandler Act in the light of the question here presented.

In re E. H. Webb Grocery Co. (*D. C. Tenn.* 1940) 32 *F. Supp.* 3.

Adams, Trustee, v. City Bank & Trust Co., (5 *CCA* 1940) 115 *F.* (*2d*) 453.

In re Talbot Canning Corporation (*D. C. Md.* 1940) 35 *F. Supp.* 680.

In all of these cases the same conclusion was reached, that a conveyance to secure a present debt is not a preference although it is subsequently recorded within four months of bankruptcy at a time when the grantee had reasonable cause to believe that the grantor was insolvent.

Two other decisions have been rendered since the enactment of the Chandler Act and have held that there can be no preference unless the conveyance was in fact given to secure an antecedent debt, thereby diminishing the estate of the bankrupt. These decisions are in accord with the instant case but can not be cited as direct authority since they did not discuss the effect of the Chandler Act. They are:

Barr & Creelman Co. v. Zoller (2 *CCA* 1940) 109 *F.* (*2d*) 924.

Bachner v. Robinson (2 *CCA* 1939) 107 *F.* (*2d*) 513.

We submit that the combined authority of all of these decisions indicates the improbability of the development of a conflict on the question here involved.

We, therefore, submit that it is unnecessary in

the ends of justice to grant a writ of certiorari in this case unless the decision of the Court below is manifestly wrong. In order to demonstrate that the decision of the Court below was correct we will set out as briefly as possible the history of Section 60 of the Bankruptcy Act of 1898 and the purposes, as we understand them, of its revision in the Chandler Act.

It has long been the rule, even before the Act of 1898, that the preference to which bankruptcy law is directed "can only arise in case of an antecedent debt," because "to secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property - - -. But the giving securities when the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid."

Tiffany v. Boatman's Savings Institution, 18 *Wall.* 375-388, 21 *L. Ed.*, 868, 871.

Petitioner argues that in enacting Section 60 of the Chandler Act Congress was undertaking to change this rule and to strike down all secret liens whether or not given to secure antecedent debts. We contend, on the contrary, that Congress intended to, and did, expressly reaffirm this rule in the enactment of Section 60 of the Chandler Act by defining a preference as a "transfer - - - for or on account of an antecedent debt - -." We contend that the legislative history of Section 60 clearly supports our position.

It has always been thought necessary in defining a voidable preference to fix some arbitrary time limit within which a preferential transfer may be attacked in or-

der that there may be some time at which a transaction can be considered closed. Under the Act of 1898 and under the present Act this arbitrary time limit was fixed at four months.

Early in the administration of the Act of 1898 it became apparent that it was feasible for a debtor and his favored creditor to avoid the provisions of the Act as to preferences by concealing the fact of the preference for four months. It was, therefore, thought advisable to extend the time within which a preference might be attacked to a date four months from the time when the fact of the preference could be ascertained by other creditors. In an amendment to Section 60 in 1910 in order to carry this intention into effect, Congress provided that "where the preference consists of a transfer such period of four months shall not expire until four months after the date of record - - if by law such recording - - is required." As originally drafted the proposed amendment had provided "if by law such recording - - - is required or permitted," but the words "or permitted" were omitted in the bill as it passed Congress. It was seriously contended that under this amendment the period of four months would not begin to run until the date of record where state laws "required" the instrument to be recorded in order to protect the transferee against the claims of bona fide purchasers. This Court, however, held that the words "is required" referred to a requirement of record to protect the transferee against someone represented by the Trustee in Bankruptcy. Accordingly, where the Trustee in Bankruptcy represented only general creditors and where the state law did not require record to protect the right of the transferee against the claims of general creditors, the transfer for an antecedent debt would not

be preferential even though recorded within the four months' period.

Carey v. Donohue, 240 *U. S.* 430, 36 *S. Ct.* 386.

Martin v. Commercial National Bank of Macon, 245 *U. S.* 513, 38 *S. Ct.* 176.

In so holding this Court emphasized the fact that the word "required" was not synonymous with the words "required or permitted." Perhaps in an effort to obviate the effect of this decision, Congress in 1926 amended Section 60 (a), which defines a preference, by adding the words "or permitted." However, Congress failed to add the words "or permitted" to Section 60 (b), which dealt with the right of the Trustee to avoid preferences.

The effect of this 1926 amendment was not submitted to this Court. Under it the Circuit Courts of Appeals had rendered conflicting opinions as to the right of a trustee in bankruptcy to avoid as a preference a transfer to secure an antecedent debt made more than four months prior to bankruptcy but recorded within the four months' period. The Fourth and Eighth Circuits held that by its failure to add the words "or permitted" in Section 60 (b) Congress manifested an intention to make it an act of bankruptcy within the meaning of Section 3 (b) to record a transfer to secure an antecedent debt within the four months' period, without at the same time giving the right to the trustee to avoid such a transfer as a preference.

First National Bank v. Livestock National Bank (8 *CCA* 1929) 31 *F* (2*d*) 416, 417.

In re Cunningham (4 *CCA* 1933) 64 *F* (2*d*) 296.

Bank of Wadesboro v. Little (4 *CCA* 1934) 71 *F* (2*d*) 513.
Small-Ferrer, Inc. v. Ware (4 *CCA* 1934) 68 *F* (2*d*) 366.

Under these decisions a creditor could institute involuntary proceedings in bankruptcy in many instances where such a procedure would be at most a bare right, because the creditor could not, through the trustee, recover the assets preferentially disposed of.

Reading Sections 60 (a) and (b) together the Seventh Circuit held that the amendment of 1926 was passed by Congress for the purpose of changing the rule laid down by this Court in *Carey v. Donohue*, 240 *U. S.* 430, 36 *S. Ct.* 386, and that the trustee could avoid as a preference a transfer for an antecedent debt made before but recorded within the four months' period.

Foltz v. Davis (7 *CCA* 1934) 68 *F* (2*d*) 495.

This case was followed in the case of in re *Jackson* (*D. C. Ark.* 1935) 9 *F. Supp.* 717, in which the Court reconciled it with the decisions of the Eighth and Fourth Circuits by pointing out that in the cases decided by the latter courts the transfers were in fact for a present consideration whereas in the Seventh Circuit the transfer under consideration was for a pre-existing debt.

Thus, as the law stood at the time of the enactment of the Chandler Act, there was no question whatever but that a transfer for a present consideration was not a preference regardless of the date of its record. The question which was still the subject of conflicting opinions was whether or not the trustee in bankruptcy could avoid a transfer for an antecedent debt made more than

four months prior to bankruptcy but recorded within the four months' period where the state law did not require record as against general creditors.

Keeping in mind that the original purpose of extending the period within which to attack a preferential transfer to a date four months after the date of recording was to prevent the debtor and his preferred creditor from keeping the fact of the preference secret until an attack by the Trustee in Bankruptcy would fail because the period of four months had already elapsed, there would seem to be no practical reason to impute to Congress an intention to change the long-standing rule that transfers to secure present advances are not preferences. Under the 1898 Act it frequently occurred that creditors who did not participate in a conveyance to secure an antecedent indebtedness were ignorant of their right to file an involuntary petition until it was too late for the trustee to avoid the conveyance. The present Section 60 was apparently designed to, and does, cover this situation.

On the contrary, a transfer for a present debt was not considered to be a preference and did not give rise to the right of a debtor to file an involuntary petition in bankruptcy against the debtor. Since the creditor had no such right, it was immaterial to him whether such a transfer was recorded or not, assuming that no fraud was in fact praticed upon him. Thus, there would seem to be no point for Congress, in dealing with preferences, to require the record of a transfer for a present consideration any particular length of time before bankruptcy. We are unaware of a "long and insistent demand of credit associations and others concerned in the administration of the bankruptcy law," to which petitioner adverts without citation, for the avoidance in bank-

ruptcy of transfers for present consideration as preferences, despite the fact that Sections 67 and 70 afford ample remedy for their avoidance if they are fraudulent in fact.

Had Congress intended to avoid transfers similar to those presently under consideration, we submit that it would have used clear language unmistakably manifesting that intention, instead of so clearly stating that a preference is a "transfer - - - for or on account of antecedent debt."

We further submit that had Congress intended such a result, it is more than probable that it would have dealt with the matter in Section 67 (d) or in Section 70 (e), which treat of fraudulent conveyances, rather than in Section 60 which deals with preferences.

A practical consideration making against the construction for which petitioner contends is the absence of any provision for a period of time within which a transfer may be recorded without being considered to be given "for or on account of an antecedent debt." In practice there is almost always an interval of time between the giving of security and its record. Thus, no matter how short the interval of time might be, the petitioner must of necessity contend that the security would be for an antecedent debt, since a bona fide purchaser could acquire rights superior to those of the transferee in the interval between the giving of the security and its record. The answer is that Congress did not intend to define "antecedent" in the second sentence of Section 60 (a) but was dealing with the date as of which the insolvency would be determined and the date as of which the four months' period would begin to run.

On page 12 of his brief petitioner argues that the report of the House Committee on Section 60 and an article by Professor McLaughlin indicates the Congressional intention to have been as petitioner contends. It seems clear, however, that both the Committee and Professor McLaughlin were speaking of preferential transfers and not of transfers for present consideration. Had they understood Section 60 as finally enacted to have the effect of rendering transfers for present consideration invalid, much clearer language could have been used to accomplish that effect. On the contrary, it seems from the entire context that the secret liens to which they refer were secret liens for antecedent debts. Had they intended such a radical change in the law, and petitioner admits on page 4 of the petition that the construction for which he contends is a "radical" change, is it not reasonable to suppose that the Committee and Dr. McLaughlin, or at least one of them, would have called specific attention to the proposed change?

So far as the petition and brief in support thereof disclose, one would infer that the sole purpose which Congress had in mind in revising the wording of Section 60 was to accomplish the result for which petitioner contends. However, if we read the entire report of the House Committee, which is set out on page 11 of the Record, it will be apparent that the rewording was necessary principally in order to fix a date on which to apply the percentage test for the purpose of determining whether the transfer would enable the "creditor to obtain a greater percentage of his debt than some other creditor of the same class," and we submit that the report does not show any purpose on the part of Congress to accomplish the result for which petitioner contends. On the other hand, we submit that the report is entirely

consistent with the purpose on the part of Congress to accomplish the result which we have outlined herein.

In conclusion we submit that the construction placed upon Section 60 by the Circuit Court of Appeals is entirely consistent with the recorded proceedings in Congress and is the only proper interpretation to be placed upon the language employed by Congress whether we seek to determine the Congressional intent from the plain language employed, without considering extrinsic circumstances, or from that language viewed in the light of the contemporaneous circumstances affecting the legislation. In view of this fact and in view of the fact that the decision of the Circuit Court of Appeals is in accordance with all other decisions upon the question, we submit that the writ of certiorari should be denied.

Respectfully submitted,

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